No. 138, Original

IN THE

Supreme Court of the United States

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

On Motion for Leave To File Complaint

REPLY BRIEF OF THE STATE OF SOUTH CAROLINA IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE COMPLAINT

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INTRODUCTION

North Carolina's inequitable interbasin transfers of water out of the Catawba River Basin have caused – and continue to threaten – substantial harm to South Carolina during periods when the Catawba River is at less than adequate flows. Contrary to North Carolina's assertions, that harm to South Carolina is not due solely to natural forces or the actions of Duke Energy, but rather is significantly exacerbated by North Carolina's unilateral actions. Although many factors affect the complex ecological conditions of the Catawba, North Carolina's actions in authorizing the transfer of at least 72.4 million gallons per day ("mgd") from the river necessarily decrease the available water for South Carolina. The uncertainty over the continued supply of the Catawba for South Carolina residents – and the absence of any other forum in which to obtain an equitable apportionment of the river – amply justifies this Court's exercise of original jurisdiction.

North Carolina erroneously asserts that South Carolina can obtain full relief from North Carolina's harmful conduct in Federal Energy Regulatory Commission ("FERC") proceedings relating to the re-licensing of a Duke Energy hydroelectric project. FERC has no authority under the Constitution to apportion river waters, so any orders it issues regarding Duke Energy cannot address the harms caused to South Carolina's citizens from North Carolina's inequitable and unilateral apportionment of the Catawba. Moreover, FERC's re-licensing decisions do not force North Carolina to recognize South Carolina's legal rights in considering future interbasin transfers from the river. North Carolina has refused to enter into negotiations toward an interstate compact regarding apportionment of the Catawba, so "[a] resort to the judicial power is [therefore] the only means left" for South Carolina to protect its rights. *Kansas v. Colorado*, 185 U.S. 125, 144 (1902) (internal quotations omitted). Accordingly, the Court should grant South Carolina's motion for leave to file a complaint and appoint a Special Master to make a recommendation as to an equitable apportionment of the Catawba River.

ARGUMENT

I. THIS COURT IS THE ONLY APPROPRIATE FORUM FOR RESOLVING THIS DISPUTE

A. This Case Meets The Normal Standards For This Court's Original Jurisdiction

In this controversy between two States, the Supreme Court's jurisdiction is both original and exclusive. *See* 28 U.S.C. § 1251(a); *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 450 (1945). South Carolina's complaint falls squarely within one of the longstanding areas this Court has identified as "particularly appropriate" for the exercise of its original jurisdiction, namely, the equitable apportionment of interstate streams. *See Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1031 n.1 (1983) (O'Connor, J., dissenting) (citing *North Dakota v. Minnesota*, 263 U.S. 365, 372-73 (1923)). Indeed, this Court has repeatedly acknowledged its "serious responsibility to adjudicate cases where there are actual existing controversies over how interstate streams should be apportioned among States." *Arizona v. California*, 373 U.S. 546, 564 (1963).

No other forum is available to South Carolina. "[W]hether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938). And no such questions can be resolved by administrative agencies of the federal government. *See, e.g., Georgia v. Pennsylvania R.R.*, 324 U.S. at 455, 462 (holding "[t]he relief which Georgia seeks is not a matter subject to the jurisdiction of the [Interstate Commerce] Commission"; rather, exercise of the Court's original jurisdiction provided the only "adequate or effective remedy").

Moreover, South Carolina has exhausted political channels in attempting to negotiate this dispute with North Carolina. Prior to seeking leave to file this action, South Carolina, through its Attorney General, expressed its

objection not only to the specific interbasin transfer to Kannapolis and Concord, but also to North Carolina's process of "unilaterally" granting interbasin transfers "without addressing the needs and rights of [South Carolina]." SC App. 1-2. South Carolina's Governor and representatives in Congress from the districts that include the Catawba and Pee Dee Basins expressed the same concerns. *See id.* at 7. South Carolina urged North Carolina to stay its hand regarding the Kannapolis-Concord transfer to allow the parties an opportunity to negotiate an interstate compact, and a Bi-State Advisory Commission made a similar recommendation.[1] But North Carolina ignored those entreaties and granted the proposed Kannapolis-Concord interbasin transfer.

Since this suit was filed, North Carolina has sought to change the facts to "mitigate" this dispute.[2] The North Carolina Assembly has authorized minor amendments to the interbasin transfer statute, and Union County has suspended (for the time being) its long-pending transfer application. *See* NC Opp. 5 n.2; NC Prelim. Inj. Opp. 2 n.2, 3-4. But those temporary palliatives do not alter the fact that South Carolina has no other alternative for protecting its rights and those of her citizens except to invoke the original jurisdiction of this Court. *See Missouri v. Illinois*, 180 U.S. 208, 241 (1901) (holding "the injury

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[1] Specifically, the Catawba/Wateree River Basin Bi-State Advisory Commission, whose members include elected representatives from both North and South Carolina, passed a resolution – submitted to the North Carolina Environmental Management Commission ("EMC") by *North Carolina Senator* Dan Clodfelter – recommending that the EMC "delay action for six months and allow the [Commission] the opportunity to attempt to assess this situation and mediate a solution," including the development of "formal procedures and compacts whereby [interstate resolutions to future issues of similar nature [could] be addressed with all participants contributing to the decision-making process." SC App. 30. The EMC refused this suggestion of a cooperative decisionmaking process and granted the permit unilaterally.

[2] *Thursday, Aug. 2, 2007, at the North Carolina General Assembly*, The Fayetteville Observer (Aug. 2, 2007), *available at* http://www.fayobserver.com/article.aspx?id=108588

complained of" – relating to an upstream State's harmful use of an interstate river – "is such that an adequate remedy can only be found in this court at the suit of the state of Missouri").

B. The FERC Re-licensing Proceedings Cannot Afford South Carolina Full Relief

North Carolina incorrectly asserts that FERC can provide South Carolina with an adequate remedy against North Carolina's unilateral interbasin transfers and that FERC proceedings to determine whether and under what conditions Duke Energy should be granted a new license to continue the operation of its hydroelectric plants along the Catawba River could "substantially resolve the matters in dispute." NC Opp. 15.

First, under the Federal Power Act ("FPA"), FERC has authority to issue a license, upon satisfactory conditions, to operators of hydroelectric projects, such as Duke Energy. *See* 16 U.S.C. §§ 792, 817(1). FERC does not have jurisdiction to oversee water withdrawals made under state statutes, such as the North Carolina interbasin transfer statute. Indeed, under the FPA, FERC has no jurisdiction over governmental entities. *See* 16 U.S.C. § 824(f); *Bonneville Power Admin. v. FERC*, 422 F.3d 908, 911 (9th Cir. 2005), *petition for cert. pending*, No. 07-155 (filed Aug. 6, 2007). Rather, FERC's only recourse for a violation of its licensing conditions is with Duke Energy, and not a State. And Duke Energy is in no way responsible for administering or authorizing any of the interbasin transfers that underlie South Carolina's complaint. As Duke Energy has explained in FERC filings, "[w]hile Duke Energy manages the lakes, it is the State of North Carolina or the State of South Carolina that makes the decisions on whether to grant [interbasin transfer] certifications." Letter from Ernest M. Oakley, Duke Energy, to Magalie R. Salas, FERC, Attach. at 2 (Jan. 22, 2007). FERC thus has no means of penalizing North Carolina's continued approvals of inequitable and unilateral interbasin transfers. *See, e.g.*, *Wyoming v. Oklahoma*, 502 U.S.

437, 452 (1992) (noting that suggestion of alternative proceedings provided no assurance "that a State's interests under the Constitution will find a forum for appropriate hearing and full relief"). North Carolina therefore is simply wrong that those FERC proceedings can adequately remedy South Carolina or justify this Court's declining to exercise its original jurisdiction.[3]

Second, North Carolina is incorrect (at 16-17) that the Comprehensive Relicensing Agreement ("CRA") will resolve this issue. In fact, CRA § 39.9 expressly disclaims resolution of the water rights issues raised in this case:

> Water Rights Unaffected – This Agreement does not release, deny, grant or affirm any property right, license or privilege in any waters or any right of use in any waters.

North Carolina's own key participant in the Duke Energy re-licensing proceedings, Steven Reed, who is Environmental Supervisor for North Carolina's Division of Water Resources, has acknowledged that the Low Inflow Protocol ("LIP") laid out in the CRA – and which is triggered at the critical time when flows become inadequate – *affects only how Duke Energy uses the water in the river*, not other users or stakeholders in the re-licensing process: "[T]he LIP would not reduce the amount of water each party (except Duke) is permitted to use. The parties have requested that FERC impose the LIP on Duke as a condition of the new license." NC App. 58a. Thus, contrary to North Carolina's assertions (at 16-17), the CRA cannot resolve the rights of North Carolina and South Carolina to the waters of the Catawba River.

[3] In *New Jersey v. Delaware*, No. 134 Orig., this Court permitted New Jersey's complaint to proceed notwithstanding the existence of FERC proceedings that Delaware asserted would moot New Jersey's case. *See* DE Opp. to NJ Mot. To Reopen at 26-27, No. 11 Orig. (U.S. filed Oct. 27, 2005). Similarly, this Court in *Maryland v. Louisiana*, 451 U.S. 725 (1981), accepted jurisdiction notwithstanding a pending FERC proceeding. *See id.* at 737 n.13.

C. The Proposed Duke Energy License Will Not Offset North Carolina's Inequitable Interbasin Transfers In Any Event

North Carolina also argues incorrectly that, if FERC decides to accept the proposed license for Duke Energy, the minimum flows from the Lake Wylie dam imposed on Duke Energy as a condition of that license will have the practical effect of offsetting the harms to South Carolina caused by the challenged interbasin transfers.

First, North Carolina asserts (off-point) that, under the proposed new license, South Carolina will enjoy more protections *vis-à-vis* Duke Energy as to certain *minimum* flows than it does under the expiring license. But the expiring license terms do not establish the appropriate baseline against which to measure South Carolina's (or North Carolina's) *equitable* share of the Catawba River under federal common law. Thus, the mere assertion that South Carolina may be better off under the new license does not automatically render North Carolina immune from claims that it has taken more than its fair share.

Second, although Duke Energy can control the Lake Wylie dam *in the sense* that its releases for power generation affect downstream users of the Catawba, it has no authority to determine the volume of water North Carolina authorizes to be withdrawn from the Catawba River Basin above that point. Importantly, under the LIP proposed in the new license, when less water flows into the system, Duke Energy is allowed to release less water from the Lake Wylie dam. *See* NC Opp. 13-14; NC App. 69a-86a. Thus, excessive interbasin transfers can – and, if unabated, likely will – artificially trigger provisions in the CRA that allow for lower flows into South Carolina.

Third, North Carolina argues that, because the model used in reaching the CRA was based on the assumption that North Carolina's consumptive transfers would increase to 85 mgd over the course of the proposed 50-year license period, all transfers of lesser volume cannot be harmful. That factual claim, however, is inappropriate

for resolution at this stage. Importantly, the CRA does not limit North Carolina to authorizing the transfer of no more than 85 mgd out of the Catawba for the next 50 years (nor does it obligate South Carolina to acquiesce in transfers up to that level). In addition, as the Morris declaration shows, in the roughly 15 years North Carolina's interbasin transfer statute has been in effect, the EMC has authorized the transfer of 43 mgd out of the Catawba, and the statute "grandfathered" the transfer of another 29.54 mgd out of the Catawba. *See* NC App. 48a-49a. Thus, North Carolina has already authorized the transfer of 72.54 mgd out of the Catawba. *See id.*

That trend virtually guarantees that, without this Court's action, North Carolina will have authorized transfers far in excess of 85 mgd within the next 50 years – indeed, the Union County interbasin transfer alone would cause North Carolina to exceed 85 mgd. South Carolina can derive little comfort from North Carolina's permit holders typically not withdrawing the maximum amount allowed under their permits. As North Carolina acknowledges, the permitting process is arduous, *see* NC Prelim. Inj. Opp. 8, and permit applicants understandably seek permits they can "grow into." As these permits age, however, permit holders will use more and more of the maximum allowed before seeking a new permit. Moreover, given that the interbasin transfers are often granted as a supplement to another primary water supply, which will become scarce in times of drought, permit holders may well withdraw more water from the Catawba when it will be most harmful to South Carolina. The CRA therefore does not offer a practical solution to North Carolina's inequitable apportionments.

D. The CRA In No Way Estops South Carolina From Bringing This Complaint

North Carolina's suggestion that South Carolina is somehow estopped from bringing this case because certain of its agencies participated in reaching the CRA is untenable. First, North Carolina mischaracterizes the CRA,

which merely acknowledges that "modeling and evaluation have predicted that . . . the flow releases anticipated from the . . . [Lake Wylie dam] are expected to meet existing and projected future (Year 2058) water use needs." NC App. 9a-10a. That quite tentative statement – which is explicitly made "subject to change and review during the term of the New License," *id.* at 10a – in no way expresses South Carolina's acquiescence to North Carolina's harmful interbasin transfers.

Moreover, the South Carolina agency authorized by law to represent the State in matters involving interbasin transfers, the Board of the Department of Health and Environmental Control ("DHEC"), has not consented to the CRA. *See* S.C. Code §§ 49-21-10, 49-21-80 (empowering DHEC's Board, subject to the approval of the General Assembly, to "negotiate agreements, accords, or compacts on behalf of and in the name of the State with other states"). To the contrary, after Concord and Kannapolis first proposed a transfer of up to 38 mgd, DHEC's Chief of the Bureau of Water, Alton Boozer, wrote to Thomas Fransen in 2001 of his "concern[] with the potential impact that this and any other proposed transfers will have on the water quality and quantity of the Catawba River, and what impact it will have on down stream users." App., *infra*, 1a.

Even if the CRA could bear the weight North Carolina places upon it, North Carolina's suggestion of estoppel is legally misconceived. It is settled law that "[a] state cannot estop itself by grant or contract from the exercise of the police power." *Sanitary Dist. of Chicago v. United States*, 266 U.S. 405, 427 (1925). Indeed, even an explicit act of South Carolina's legislature could "neither bargain away the police power nor in any wise withdraw from its successors the power to take appropriate measures to guard the safety, health, and morals of all who may be within their jurisdiction." *Texas & N.O.R.R. v. Miller*, 221 U.S. 408, 414 (1911).

II. NORTH CAROLINA'S UNILATERAL INTERBASIN TRANSFERS HARM SOUTH CAROLINA

North Carolina blames natural forces for the harms its interbasin transfers cause, claiming (at 18) that "[t]he gist of South Carolina's complaint is that the Catawba River produces less water in times of drought." Indeed, its supporting declarations seek to demonstrate that North Carolina suffered from the recent drought as well and that, most of the time, the Catawba River carries enough water to satisfy all current uses. But those arguments in fact *support* this Court's jurisdiction to impose an equitable apportionment. South Carolina's complaint asserts that, in times of inadequate flows, North Carolina's interbasin transfers substantially and unlawfully exacerbate the harm to South Carolina over and above that caused by other forces. *See, e.g.*, SC App. 14. And, because North Carolina will not agree to a compact or restrict its withdrawals, South Carolina has no means of protecting itself during times when the Catawba's flow is inadequate and North Carolina takes more than its fair share.

A. South Carolina's Complaint Appropriately Focuses On Times Of Inadequate Flow

It is undeniably true that droughts happen only some of the time. In fact, North Carolina has declared that "extreme drought" conditions now exist in a portion of the Catawba River Basin, with "severe drought" conditions prevailing in the remainder.[4] And, as Dr. Badr's summary report shows, the Catawba periodically experiences inadequate flows even absent drought conditions. *See* SC App. 16 ("The Catawba River can experience very low flows at any time of year, not just during the dry summer and fall months.").

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[4] *Compare* North Carolina Drought Management Advisory Council http://www.ncdrought.org (visited Aug. 19, 2007) (showing drought areas) *with* North Carolina Division of Water Quality *General Map of the Catawba River Basin* http://h2o.enr.state.nc.us/basinwide/which_basin/catawba.htm (visited Aug. 19, 2007). *See also* Assoc. Press, *Official: S.C.'s drought status could be upgraded to severe soon* (Aug. 21, 2007), http://www.wilmingtonstar.com/article/20070821/APN/708210770

This Court's past equitable-apportionment decrees have routinely – and appropriately – taken into account variances in a river's flow. *See, e.g., New Jersey v. New York*, 283 U.S. 336, 346-47 (1931) (establishing injunction setting a certain level below which, consistent with New Jersey's equitable rights, New York had to allow the Delaware River to pass); *see also Colorado v. New Mexico*, 459 U.S. 176, 189 (1982) (ordering Special Master to consider "extent to which present levels of use reflect current or historical water shortages"). South Carolina seeks a similar apportionment from the Court here.

B. Disputed Factual Issues Raised By North Carolina Highlight The Need For A Special Master

Among other factual issues, North Carolina challenges causation – whether the harm South Carolina alleges is caused by North Carolina's interbasin transfers or instead by some other force – but that question cannot be resolved at this stage of the litigation. South Carolina adequately alleges substantial harm from North Carolina's interbasin transfers and is accordingly entitled to prove its claim. *See Nebraska v. Wyoming*, 515 U.S. 1, 14 (1995) (noting that Nebraska's "allegations describe a change in conditions sufficient, if proven, to warrant the injunctive relief sought, and Nebraska is accordingly entitled to proceed with its claim"). Similarly, North Carolina's various efforts to impeach South Carolina's witnesses or to quarrel with experts' theories, at best, raise disputed factual issues that should not be resolved on the present record. *See, e.g., Kansas v. Colorado*, 185 U.S. at 147 (holding that, "in view of the intricate questions arising on the record, we are constrained to forbear proceeding until all the facts are before us on the evidence"). Appointment of a Special Master in this matter is therefore warranted.

CONCLUSION

The Court should grant South Carolina's motion for leave to file a complaint and appoint a Special Master to make a recommendation how the Catawba River should be equitably apportioned.

Respectfully submitted,

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August 22, 2007

APPENDIX

D H E C
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December 14, 2001

Mr. Tom Franzen
Division of Water Resources
North Carolina Department of Environment
and Natural Resources
1611 Mail Service Center
Raleigh, NC 27699-1611

Re: Catawba River Interbasin Transfer

Dear Mr. Franzen:

The South Carolina Department of Health and Environmental Control has reviewed the proposed Inter-Basin Transfer from the Catawba River basin to the Yadkin-Pee Dee basin. The Department is concerned with the potential impact that this and any other proposed transfers will have on the water quality and quantity of the Catawba River, and what impact it will have on down stream users.

We need to be assured that withdrawal of water from the Catawba River basin, with ultimate disposal in the Yadkin-Pee Dee basin, would not have adverse impacts on

water quality standards or water uses of the Catawba River. Municipalities and industries in South Carolina rely on the Catawba River for water supply and wastewater disposal. Moreover, citizens of South Carolina use the Catawba River and its lakes for recreation. Transfer of water from this basin could ultimately affect existing permits issued by SCDHEC.

Please consider this as notification of the Department's concerns of the proposed interbasin Transfer Permit. I would appreciate receiving a copy of the draft permit, if issued.

Sincerely yours,

/s/ Sally C. [illegible] for
Alton C. Boozer, Chief
Bureau of Water